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Ontario Labour Relations Board HIGHLIGHTS

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NEW BOARD MEMBERS

The Board is pleased to announce the appointment of four more part-time Members:

Management side:

Robert LeChien is General Manager of the Canadian Pipe Fabricators Association. His community involvement has included serving as a member of the Roster of Adjudicators for the College of Trades and the Hamilton Halton Labour Relations Committee.

Union side:

Thomas Collins is a former Assistant to the National President of the Canadian Auto Workers. He also serves as an unpaid trustee of Retirement Pension Trust Metro Ontario Inc./Unifor, Local 414.

William Nicholls has been a 40 year member of the International Union of Painters and Allied Trades, serving in many leadership roles of the IUPAT as an organizer, negotiator, health & safety representative, administrator, and mentor. He has served as a member of the Minister of Labour Construction Industry Panel, on the board of the Ontario Construction Secretariat, past President of the former Construction Safety Association of Ontario, and past President of the Provincial Building & Construction Trades Council of Ontario.

Edward Chudak has extensive experience in labour relations in the education sector. He retired as Department Head of Collective Bargaining and Contract Services with the Ontario English Catholic Teachers' Association.

SCOPE NOTES

The following are scope notes of some of the decisions issued by the Ontario Labour Relations Board in May of this year. These decisions will appear in the May/June issue of the OLRB Reports. The full text of recent OLRB decisions is now available on-line through the Canadian Legal Information Institute www.canlii.org.

***School Boards Collective Bargaining Act, 2014* – Strike** – Three school boards sought a declaration from the Board that their secondary teachers had engaged in unlawful strikes when they withdrew services over "local" issues but in fact struck over "central" issues without first having taken the necessary steps to be on a lawful and timely strike – The Board looked, for the first time, at the scheme of two-tiered bargaining in the education sector and the presence of the Crown at the central bargaining table – The issue in dispute was the intersection of central and local bargaining when a local strike occurs – The school boards and the Crown argued that a local strike had to be pure – The OSSTF's position was that once a local strike has commenced, the striking teachers could voice their support more broadly, even to include issues that were outstanding at the central bargaining table – The Board held that the SBCBA prohibits employees striking in respect of central bargaining even if all the statutory prerequisites for a strike in respect of local bargaining have been met – The Board accepted the school boards' argument that

even a taint of central issues in the current strike would be sufficient to make it unlawful – The evidence proffered by the school boards sufficiently showed that, on the balance of probabilities, the local strikes were, at least in some part, in respect of central bargaining – The Board declared that the teachers were on an illegal strike and ordered them to cease and desist for a two week period – Application granted

DURHAM DISTRICT SCHOOL BOARD, RAINBOW DISTRICT SCHOOL BOARD AND PEEL DISTRICT SCHOOL BOARD; RE: ONTARIO SECONDARY SCHOOL TEACHERS' FEDERATION; RE: ONTARIO PUBLIC SCHOOL BOARDS' ASSOCIATION; RE: HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO AS REPRESENTED BY THE MINISTRY OF EDUCATION (THE "CROWN"); RE: CANADIAN UNION OF PUBLIC EMPLOYEES; OLRB File No. 0376-15-U; Dated May 26, 2015; Panel: Bernard Fishbein (53 pages)

Health and Safety – Remedies – Reprisal – When the responding party failed to file a response to this application, the Board invoked Rule 2.3, holding that the responding party failed to satisfy the onus placed on it by subsection 50(5) of the OHSA and deeming that the responding party had accepted all the facts set out in the application – The Board held that Rule 2.3 was limited in its application to deemed acceptance of material facts and did not extend to acceptance of legal positions or consent to remedies requested by the applicant – At the hearing on remedies, the Board found the applicant displayed a casual approach to his evidence and a lack of appreciation for the value of precision in recounting his post-discharge employment and mitigation efforts – While the responding party bears the onus of establishing a want of mitigation, the Board cannot ignore the approach taken and effort expended by the applicant in determining appropriate compensation – Where there is evidence of an applicant making some attempts to secure employment, but the approach taken is ill-conceived, poorly executed or unsupported by a logical factual basis, the Board should hesitate to conclude the applicant made reasonable efforts to mitigate, and should reflect those concerns in the damages award – Also, in a case where the finding against the responding party was made as a result of its failure to respond to the application (and thus having been deemed to accept the applicant's facts), the Board would not order a public posting of a Notice that the OHSA had been violated – Damages award issued

GRAND TAPPATTOO RESORT; RE: ANDREW STRINGER; OLRB File No. 3542-14-UR; Dated May 12, 2015; Panel: Derek L. Rogers (16 pages)

Collective Agreement – Duty of Fair Representation – Grievance – Remedies – Settlement – The Applicant alleged CEP failed to refer her grievance to arbitration and to sufficiently negotiate with the Employer following cessation of her employment – The grievance concerned "entitlements to a Voluntary Separation, including but not limited to a pension enhancement, medical benefits, pension payments and severance payments" – The Applicant decided to pursue the Voluntary Separation Program even though her position was not ultimately outsourced – The Employer approved the Applicant's application for the VSP, stipulated a release date and issued an approval letter outlining pension benefit entitlements upon release – The Applicant argued she was not informed of her pension entitlements under the VSP pursuant to section 28(1) of the *Pension Benefits Act* – The Employer asserted it could not precisely calculate severance pay entitlements because the Applicant's failure to execute the VSP approval letter prevented it from doing so – The Applicant rejected the offer because it did not provide for pension enhancements or retroactive pension pay; in addition, she was not satisfied with the equivocal manner in which legacy benefits were to be provided – The Applicant applied to the Financial Services Commission of Ontario for pension payments – The Union advised the Applicant it could negotiate a better settlement than she would receive through FSCO – When CEP attempted to accept the Employer's offer on the Applicant's behalf, she alleged the attempt was arbitrary – The Union asserted the Applicant failed to accept reasonable settlement offers and that it had discharged its duty under section 74 of the Act – There was no suggestion that other employees were similarly situated, thus it was difficult to assess the union's treatment of the Applicant relative to other members of the bargaining unit - The crux of the issue was whether the Union's behaviour was arbitrary – The Board held the Union failed to provide any substantive reasons justifying its decision not to pursue the grievance – The complexity of issues, importance of the benefits in dispute, and the unusual circumstances of the case required the Union to provide the Applicant with more comprehensive reasons for

its decision not to pursue the grievance – CEP was ordered to obtain a legal opinion regarding the Applicant's requested remedies – In the event the Union decides to pursue the grievance to arbitration, the Employer was ordered to waive applicable time limits – Application allowed

JOAN MCKEOWN; RE: COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA LOCAL 87-M SOUTHERN ONTARIO NEWSPAPER GUILD; RE: TORONTO STAR NEWSPAPERS LIMITED; OLRB File No. 0149-13-U; Dated May 12, 2015; Panel: Roslyn McGilvery (24 pages)

Employment Standards – Estoppel – *Prima Facie* Motion – The Applicant sought review of Compliance Orders relating to hours of work and overtime and the requirement to maintain and produce records and audits regarding employment standards – The Applicant brought a preliminary motion asking for the Compliance Orders to be quashed on basis of issue estoppel – An earlier Board decision addressed the issue of entitlement of Mashgiachim (kosher food inspectors) to overtime – The Director of Employment Standards conceded one element of issue estoppel (that the earlier decision was final); however, he contended that the parties to the two proceedings were not the same (different food inspectors, a different Employment Standards Officer) – The DES conceded he made a "conscious decision" not to participate on the overtime aspect of the earlier proceeding – The Applicant argued that the DES is automatically made a party under every review pursuant to section 116 of the ESA and that parties should not be able to escape the consequences of issue estoppel by consciously choosing not to participate in a proceeding for which they are automatically a party, have been provided with notice and have had an opportunity to participate – The Board looked at the degree of the DES's participation in the prior hearing and determined the DES was not a party to that proceeding for purposes of issue estoppel – Moreover, even if the test for issue estoppel was satisfied, the Board still had discretion to determine whether the principle should be applied – The Board declined to exercise its discretion to apply issue estoppel – Matter to proceed on the merits

KASHRUTH COUNCIL OF CANADA / LE CONSEIL CACHEROUT DU CANADA; RE: DIRECTOR OF EMPLOYMENT STANDARDS; OLRB File No. 0045-14-ES; Dated May 21, 2015; Panel: Bernard Fishbein (15 pages)

Health and Safety – Practice and Procedure – *Prima facie* Motion – Following the critical injury to a nurse in the psychiatric unit of the Brockville Hospital (a branch of Royal Ottawa), ONA sought interim and permanent orders from the Board providing, among other things, adequate security staff for the protection of health care workers – The Board issued an interim order requiring the hospital to place a sufficient number of properly trained security staff in the unit, and authorizing the security professionals to "place their hands on a patient and detain them for the purposes of protecting themselves and the staff from injury" – The Ministry of Labour and the Hospital both challenged the Board's ability to make the above-mentioned orders, arguing that the inspector had no authority to make such an order in the first place (or refuse to make such an order) and therefore the Board's jurisdiction was consequently circumscribed – The Board rejected the motion, stating that a plain reading of s. 61 of the OHSA confers a broad discretion on the Board with no limitation to the specific orders or remedies considered by the inspector – Moreover, the definition of "order" in the statute means any order or decision made or given, or the imposition of any terms and conditions, or even the refusal to make an order or decision, by an inspector – But the scope of an appeal is not without limits: the Board can, and has, curtailed expansive requests to review inspectors' orders – In any event, the materials before the Board clearly showed that the issues and possible remedies raised before the Board were in the mind of the inspector – *Prima facie* motion dismissed – Matter continues

ROYAL OTTAWA HEALTH CARE GROUP - BROCKVILLE MENTAL HEALTH CENTRE; RE: ONTARIO NURSES' ASSOCIATION; RE: A DIRECTOR UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT; RE: ONTARIO PUBLIC SERVICE EMPLOYEES UNION; OLRB File No: 2460-14-HS, 2999-14-IO & 3000-14-IO; Dated May 4, 2015; Panel: Matthew R. Wilson (24 pages)

COURT PROCEEDINGS

Construction Industry – Judicial Review – Termination – LIUNA sought review of a Board decision that terminated its bargaining rights with the employer – LIUNA argued that the Board's decision, which followed on an earlier application for termination of bargaining rights that had been

dismissed because of employer interference, was necessarily tainted by the facts of the earlier proceeding – The Board found otherwise – The Court, applying a reasonableness standard, found there was nothing irrational in the Board's ruling that the circumstances had changed in the intervening period and the union could not point to any factual allegations implicating the employer in the subsequent application – Application for judicial review dismissed

LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, ONTARIO PROVINCIAL DISTRICT COUNCIL; RE: RUDYARD A. SWABY; RE: ZZEN GROUP OF COMPANIES LIMITED; RE: ONTARIO LABOUR RELATIONS BOARD; Divisional Court File No. 485/13; Dated May 5, 2015; Panel: S.F.J. Czutrin, Harvison Young and Gray, JJ. (5 pages)

The decisions listed in this bulletin will be included in the publication Ontario Labour Relations Board Reports. Copies of advance drafts of the OLRB Reports are available for reference at the Ontario Workplace Tribunals Library, 7th Floor, 505 University Avenue, Toronto.

Pending Court Proceedings

Case name & Court File No.	Board File No.	Status
Carlene Bailey Divisional Court No.173/15	0480-13-U	Pending
Valoggia Linguistique Divisional Court No.15-2096	3205-13-ES	Pending
Toran Carpentry Inc. Divisional Court No.49/15	0229-13-R	Pending
Sentry Electrical (Canada) ULC Divisional Court No. 041/15	0505-14-R	Pending
Charles Zubovits Divisional Court No. 3/15	1368-04-U	September 29, 2015
Royal Ottawa Hospital Divisional Court No.14-62782 **(Ottawa)**	2461-14-IO	Pending
BACU (BMC Masonry) Divisional Court No.459/14	3236-13-R 0451-14-U	September 17, 2015
College Employer Council Divisional Court No.397/14	1143-14-CV	May 22, 2015 Reserved
Dean Warren Divisional Court No.345/14	2336-13-U	September 22, 2015
Donald A. Willams Divisional Court No.327/14	1129-13-U	Pending
PCL Constructors Canada Inc. Divisional Court No. 240/14	3414-11-G	Pending
John Harrison Divisional Court No. 189/14	1375-13-U	February 20, 2015 Reserved
Mary McCabe Divisional Court File No.14-2012 **(Ottawa)**	2737-12-U	Dismissed for delay May 5, 2015
LIUNA - Rudyard; Zzen Divisional Court No. 485/13	0318-13-R	Dismissed May 5, 2015
Godfred Kwaku Hiamey Divisional Court No. 345/13; 346/13	2906-10-U 3568-10-U	May 11, 2015 Reserved
EllisDon Corporation Court of Appeal No. 36256 (EllisDon seeking leave to SCC)	0784-05-G	Leave to SCC Dismissed May 14, 2015